

BAIL SLIP

The Accused/Petitioner namely 1.Narayanan @ Saravanan S/o.Sendhura Pandian was directed to be released on bail dated 07.09.2018 made in CrI.MP.No.6423/2018 in CrI.A.No.265/2018.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28.01.2020

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE R. PONGIAPPAN

Criminal Appeal Nos.265 and 783 of 2018

Narayanan @ Saravanan .. Appellant in CrI.A.No.265 of 2018
Pandi @ Duraipandian .. Appellant in CrI.A.No.783 of 2018

Versus

State of Tamil Nadu,
Represented by the Inspector of Police,
Anupar Palayam Police Station,
(Crime No.1817 of 2008),
Tiruppur District. .. Respondent in both the Appeals

Criminal Appeals filed under Section 374(2) Cr.P.C. against the judgment of conviction and sentence, dated 23.06.2017 passed in S.C.No.164 of 2015 on the file of the II Additional District and Sessions Court, Thiruppur.

For appellants : Mr.M.Devaraj
in CrI.A.No.265 of 2018
Ms. S.R.Sumathy in
CrI.A.No.783 of 2018

For respondent :Mrs. M. Prabhavathi
Additional Public Prosecutor in
both the appeals

COMMON JUDGMENT

(The Common Judgment of the Court was delivered by R.Subbiah, J)
The appellant in CrI.A.No.265 of 2018 is A-1 and the appellant in CrI.A.No.783 of 2018 is A-2, in S.C.No.164 of 2015 on the file of the Second Additional District and Sessions Court, Tiruppur. The trial Court framed charges against the appellant/A1 under Sections 294(b), 302 and 307 read with 34 IPC and against the appellant/A2 under Sections 294(b), 307 and 302

read with 34 IPC. By judgment dated 23.06.2017, the trial Court while acquitting A-1 of the charge under Section 294(b) IPC, convicted A1 and A2 as follows:

Rank of Accused	Conviction	Sentence with fine
A1	(i) Section 302 IPC	Life imprisonment with fine of Rs.5,000/-, in default, to undergo one year rigorous imprisonment
	(ii) Section 307 read with 34 IPC	ten years rigorous imprisonment with fine of Rs.5,000/-, in default, to undergo one year rigorous imprisonment
A2	(i) Section 294(b) IPC	fine of Rs.500/-, in default, to undergo one month simple imprisonment
	(ii) Section 307 IPC	ten years rigorous imprisonment with fine of Rs.5,000/-, in default, to undergo one year rigorous imprisonment
	(iii) Section 302 read with 34 IPC	Life imprisonment with fine of Rs.5,000/-, in default, to undergo one year rigorous imprisonment.

The sentences imposed on the appellants/A1 and A2 were directed by the trial Court to run concurrently.

2. The case of the prosecution as put forth by its witnesses, is consciously narrated below:

(i) The deceased in this case is one Thirumurthy. P.W.1 is the injured witness and brother of the deceased Thirumurthy. A2 and P.W.1 are friends. P.W.1 was in need of money and hence, on 22.10.2008, he approached a financier, namely Senthil Finance at Periar Colony to avail loan. While he was in the said finance Company to avail loan, A2 came there. Hence, P.W.1 requested A2 to stand as a guarantor/surety for his loan amount. A2 also agreed for the same and signed the documents as surety/guarantor for the loan amount of Rs.15,000/-. Since A2 stood as a guarantor/surety, he asked for a sum of Rs.6,500/- out of the loan amount of Rs.15,000/- for his expenses. A2 has also assured that he would pay the said sum of Rs.6,500/- within three months.

(ii) Thereafter, A2 paid the first instalment alone and thereafter, he did not pay the loan amount. Hence, on 28.12.2008 at about 8 p.m., P.W.1 went to the workshop of A2 and demanded him to pay the outstanding loan amount, which he has to pay. However, A2 indulged in a quarrel with PW1 and abused P.W.1 in filthy language. Hence, P.W.1 forcibly took a Suzuki motor cycle and rode it to his house. While so, at about 11 p.m., when P.W.1 was sleeping in his house, A2 came along with his brother A1 and called him to come out of the house. On hearing the voice of A1 and A2, P.W.1 and his brother, the deceased Thirumurthy and their mother, came out of the house. At that time, A-1 and A-2 abused P.W.1 and asked him as to why he has forcibly taken the Suzuki bike. On hearing the noise, neighbours residing in the area also came out of their house. At that time, A-2 picked up a wooden log, which was in the bike i.e. Suzuki bike bearing Reg.No.TN-39-R-5602 and attacked P.W.1 on the left side of his head and neck. On witnessing the commotion, the deceased came to the rescue of his brother, PW1. At that time, A-1 hit the deceased with a wooden log and left him bleeding. The occurrence was witnessed by P.W.1's mother and neighbours. Thereafter, both the accused fled away from the scene of occurrence.

(iii) Since both P.W.1 and the deceased were seriously injured, an Ambulance was brought to the place of occurrence and P.W.1 and the deceased were taken to Thirupur Government Hospital where they were admitted as in-patients.

(iv) Upon intimation received from the hospital, P.W.9 Sub-Inspector of Police proceeded to the hospital at about 1.50 a.m. on 28/29.12.2008 and received a statement from P.W.1, since the deceased was not in a position to speak. Thereafter, P.W.9 returned to the Police Station at about 3 a.m. on 29.12.2008 and registered a case in Crime No. 1817 of 2008 for the offences

under Section 294(b) and 307 IPC. P.W.9 has forwarded the complaint as well as the FIR, Ex.P-1 to the concerned Judicial Magistrate and handed over the investigation to P.W.10 Inspector of Police, who took up the investigation at about 5 a.m. and proceeded to the place of occurrence where he prepared Ex.P-4 observation mahazar and Ex.P-16 rough sketch in the presence of witnesses. He has also collected the blood stained soil and sample soil from the place of occurrence in a seizure mahazar and obtained the signatures of the witnesses. He forwarded the same to the Court under Form 95.

(v) Thereafter, PW10 proceeded to Coimbatore Government Hospital and recovered the blood stained clothes of the deceased and P.W.1 in the presence of the witnesses Muruganantham P.W.3 and one Viswanathan and forwarded the same to the Court under Form 95. Then, he recorded the statement of the witnesses and on 02.01.2009, at about 9 p.m., he arrested the accused persons in the presence of P.W.4 and one Prabhu. On such arrest, A1 gave voluntary confession statement and disclosed the place where he had hidden the wooden logs. Pursuant to the same, A1 took P.W.10 to the house in Door No.5/95, from where the two-wheeler was seized under seizure mahazar and wooden logs were seized from the backyard of the house in the presence of witnesses. P.W.10 also recorded the statement of one Prabhu and Ram P.W.4.

(vi) The accused persons were sent for judicial custody. Thereafter, P.W.10 took steps to send the material objects for chemical examination. Subsequently, on his transfer, PW10 handed over the investigation to P.W.11 Inspector of Police. In the meanwhile, the deceased, who was taking treatment, succumbed to the injuries on 07.01.2009. P.W.11. on receipt of the information that the injured victim namely Thirumoorthy died in the hospital, altered the FIR by including the offence under Section 302 IPC. Ex.P-17 is the alteration report, which was sent to the Judicial Magistrate concerned. Thereafter, on 07.01.2009 at about 9 a.m., he proceeded to the hospital where the deceased died and conducted inquest on the body of the deceased in the presence of P.W.1 and other witnesses. Ex.P-18 is the inquest report.

(vii) P.W.7 is the Doctor who conducted post-mortem on the body of the deceased. He issued Ex.P-14 post-mortem certificate and opined that the deceased would appear to have died of head injury.

(iv) On transfer of PW11, the investigation was handed over to P.W.12, Inspector of Police, who upon completion of all the other formalities filed charge sheet against the

appellants/A1 and A2 for the offences under Section 294(b), 307 and 302 read with 34 IPC.

(viii) Based on the above materials, the trial Court framed appropriate charges as stated in the first paragraph of this judgment. When the accused were questioned on the charges, they pleaded innocence.

(ix) On the side of prosecution, P.Ws.1 to 12 were examined, Exs.P-1 to P-18 were marked and M.Os1 to 11 were produced.

(x) When the trial Court questioned the accused under Section 313 Cr.P.C., in respect of the incriminating materials and evidence available against them, they denied their complicity in the crime. However, they did not choose to examine any witness, nor mark any document.

(xi) Upon considering the oral and documentary evidence available on record, the trial Court convicted and sentenced the appellants/A1 and A2 as stated earlier in this judgment. Challenging the same, the respective appellants/A1 and A2 are before this Court by filing the respective Criminal Appeals.

3. The learned counsel for the appellants/A1 and A2 submitted that there are lot of contradictions in the evidence of the prosecution witnesses and those contradictions would prove that the occurrence could not have happened in the manner as put forth by the prosecution. In support of the said submission, the learned counsel for the appellants/A1 and A2 took this Court to the evidence of the prosecution witnesses. According to the learned counsel for the appellant/A1 P.W.1 was attacked with the wooden logs by A2 and deceased was attacked with wooden logs by A1. But in the accident register Ex.P-11 pertaining to the deceased, it is stated that the deceased was attacked by three unknown persons. P.W.6 Doctor who admitted P.W.1 in the hospital, admitted in his cross-examination that the deceased informed him at the time of admission that he was attacked by three unknown persons. The evidence of P.W.6 Doctor clearly shows that P.W.1 and the deceased were attacked by three unknown persons. In this regard, the learned counsel for the appellant/A1 invited the attention of this Court to Ex.P-12 accident register copy pertaining to P.W.1, wherein it was recorded that P.W.1 had received cut injury. Even in the cross-examination of P.W.6, it is stated that the cut injury could be caused only with the knife or sharp weapon and thus, it is clear that the injury was not caused by wooden logs, as projected by the prosecution.

4. The learned counsel for the appellant/A1 further submitted that it is the case of the prosecution that the appellants/A1 and A2 went to the house of the deceased only to bring back the bike which was forcibly taken by P.W.1 on the date of occurrence, whereas P.W.1 has stated in his evidence that the accused took the wooden log from the Suzuki bike and assaulted him. It is pertinent to note that this bike, according to P.W.1, belonged to A2, was brought by him to his house forcibly on the date of occurrence itself. Therefore, his statement that the accused took the wooden log from the bike, is totally unbelievable as the bike was in the possession PW1 and stationed in front of his house at the time of occurrence.

5. It is the further submission of the learned counsel for the appellant/A1 that P.W.2 has stated in his evidence that at the time of occurrence, it was dark and there was no light. While so, it is highly improbable for PW2 to state about the overt act attributed against each accused. Further, P.W.2 in his cross-examination admitted that he does not know the accused prior to the occurrence. Therefore, the conviction recorded by the trial Court based on the evidence of P.Ws.1 and 2 is liable to be set aside.

6. The learned counsel appearing for the appellant/A2 submitted that A2 was convicted for the offence under Section 302 read with 34 IPC, 307 and 294(b) IPC. It is A1 who had attacked the deceased in front of the house of P.W.1, whereas the investigating officer in his charge sheet indicated that the occurrence took place outside the compound wall of the house and significantly, in road, thus it generates a doubt about the place of occurrence. This contradiction had not been properly considered by the trial Court. Further, according to the prosecution, the Suzuki bike belonging to A2 was forcibly taken by P.W.1 on the date of occurrence and stationed in front of his house, but the prosecution case would reveal as if the accused persons came to the house of P.W.1 in the said bike with the wooden log, which is totally unbelievable. The prosecution also projected as if the occurrence was witnessed by the mother of PW1 and deceased, but she was not examined as a witness. Therefore, the non-examination of the mother of the deceased, said to have been present at the time of occurrence and other witnesses namely Muthusamy, Perumal, Pazhaniyamma, Rasu, etc., is fatal to the case of the prosecution. The learned counsel appearing for A2 also submitted that in the light of the above contradictions in the deposition of prosecution witness, it would not warrant a conviction against the accused, more particularly when non-examination of the above persons before

the trial Court, is fatal to the case of the prosecution.

7. Alternatively, while concluding the arguments, the learned counsel for the appellant/A2 submitted that even according to the case of the prosecution, A2 had no intention to kill the deceased and he went to the scene of occurrence only to bring back his bike, which was taken by P.W.1 forcibly from A-1. While asking P.W.1 for return of the bike, a quarrel ensued between P.W.1 and the accused persons during which it was alleged that the accused 1 and 2 attacked PW1 and the deceased. Further, the deceased died on 07.01.2009, ten days after the alleged occurrence on 28.12.2008. There was no premeditation for the accused persons to commit the crime and the occurrence had happened due to sudden provocation. Therefore, the learned counsel submits that the act of the accused persons would not fall within the purview of Section 302 IPC and at the most, it would fall within the ambit of Exception to Section 300 IPC. Under such circumstances, the accused persons are liable to be punished only under that Exception and hence, the learned counsel for both the appellants prayed that this Court may modify the sentence recorded against the appellants under Section 302 IPC to one other lesser sentence by showing leniency.

8. The learned Additional Public Prosecutor appearing for the respondent submitted that the prosecution has proved its case beyond reasonable doubt and therefore, the conviction and sentence recorded by the trial Court need not be interfered with. P.W.1 was not only a eye witness, but also a victim, who sustained injuries at the instance of PW2. He had clearly deposed about the specific overt act on the part of the accused. The sole testimony of PW1 itself is sufficient for the trial court to base an order of conviction against the appellants, which the trial court has rightly done in this case. It is her further submission that the accident register is only corroborative piece of evidence and therefore, when the evidence of the eye-witness is clear, cogent and convincing, the conviction cannot be interfered on the basis of minor inconsistencies recorded in the accident register alone. The prosecution has proved its case through the evidence of P.Ws.1 and 2 and she prayed for dismissal of the appeals. In support of her submissions, the learned Additional Public Prosecutor relied on the following decisions of the Apex Court:

- (i) 2019 (7) SCC 476 = 2019 (3) SCC (Cri) 73 (Ramesh Dasu Chauhan Vs. The State of Maharashtra);
- (ii) 1983 (2) SCC 174 = 1983 SCC (Cri) 379 (Solanki Chimanbhai Ukabhai Vs. State of Gujarat), and

(iii) 2003 (7) SCC 56 = 2003 SCC (Cri) 1577 (Krishnan and another Vs. State Rep. by Inspector of Police).

9. We have given our anxious consideration to the submissions made on either side and perused the materials available on record.

10. The first accused and PW1 are friends. Earlier, for the loan availed by PW1, the first accused stood as a guarantor. Further, after disbursement of the loan amount, a portion thereof was demanded by the first accused from PW1, who received it on the assurance that he would repay the portion of the loan amount with accrued interest. Since the first accused did not repay the loan amount when demanded by PW1, it is stated that PW1 had forcibly taken the Bike of A-1 on 28.12.2008 and stationed at his residence. On the same day, A-1 along with A-2 came to the house of PW1 at 11.00 pm in the night. A-1 questioned PW1 as to why he had forcibly taken possession of his two wheeler. A wordy quarrel erupted which resulted in the second accused attacking PW1 and the first accused giving a fatal blow on the head of the deceased. This incident had gathered the crowd and was witnessed by the neighbours, including PW2. Therefore, according to the prosecution, the occurrence in this was witnessed by eye witnesses. Therefore, whether the witnesses examined on the side of the prosecution have supported the prosecution case needs to be examined.

11. PW1 is not only an eye witness to the occurrence, but also a victim, who received blows on his left side head, back and shoulders at the hands of the second accused. When the deceased came to the rescue of PW1, he received a fatal blow on his head at the hands of the first accused. According to PW1, after receipt of such blows, he swooned and fell on the ground. According to PW1, the incident was witnessed by his mother Mrs. Muthamma, Mani, Muthusamy, Perumal, Palaniammal and Rasu. Admittedly, the mother of PW1, namely Mrs. Muthamma was not examined as a witness. Similarly, Muthusamy, Perumal, Palaniammal and Rasu were also not examined. At the same time, Mani, one of the neighbours was examined as PW2. PW3 is a colleague of PW1, who met PW1 on hearing that he sustained injuries at the behest of the appellants and therefore he is not an eye witness. Similar is the case of PW4, who is known to PW1, who visited PW1 in the hospital on hearing that he sustained injuries in a wordy quarrel. Similarly, PW5 is related to PW1 and his family who met the injured in the hospital on hearing about the attack on the previous day. Therefore, PW1 and 2 alone are projected by the prosecution as eye witnesses and their evidence requires a close scrutiny.

12. As mentioned above, PW1 is not only an eye witness to the occurrence but he has also sustained injuries at the behest of the appellants. On the other hand, PW2 is an independent witness examined by the prosecution. PW2 narrated the sequence of events that led to the attack on PW1 and the deceased. According to PW2, he came to the scene of occurrence on hearing a commotion between PW1, his brother (the deceased) and the appellants. It is the deposition of PW2 that after the attack, appellants fled the scene in the two wheeler by taking possession of the wooden logs used for committing the crime. Of course, in the cross-examination, PW2 has stated that at the time of occurrence, it was about 11.00 pm and he could not precisely narrate as to who caused the injuries on whom. However, such deposition, in our opinion, will not discredit the deposition of PW2 in any manner. We are of the view that merely because PW2 has stated that he could not precisely indicate as to who has caused the blow on PW1 or the deceased, his evidence cannot be discarded. The fact remains that the deposition of PW2 is trustworthy and it is credible.

13. The learned counsel for the appellants would contend that in the Accident Register, Ex.P12 relating to PW1 it was recorded that PW1 was attacked by three unknown persons. Similarly, in the accident register of the deceased, Ex.P11, it was stated that he was attacked by three unknown persons. This was also reiterated by PW6, Doctor, by stating that the deceased, at the time of his admission, has stated that he was attacked by three unknown persons. The deposition of PW6 as also the entries made in Ex.P11 and P12, may be an inconsistency. However, whether it would affect the credibility of the prosecution case has to be seen. When eye witnesses have narrated the overt act of the appellants clearly and cogently, the Accident Register under Exs. P11 and P12, can at best, lend support to the case of the prosecution. Exs. P11 and P12 can be a piece of material evidence and it cannot be wholly relied on either to accept the case of the prosecution or to reject it. Therefore, in our opinion, the entries in Exs. P11 and P12 cannot be taken as the one which would topple the case of the prosecution in any manner. In this context, reliance could be placed on the judgment of the Supreme Court, relied on by the learned Additional Public Prosecutor in the case of Solanki Chimanbhai Ukabhai (cited supra), wherein it is held by the Supreme Court that ordinarily, the value of medical evidence is only corroborative and it proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye witnesses. Unless,

however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries sustained in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. Thus, we are of the view that the version of the eye-witness will outweigh the medical witness in case of conflict between the two.

14. Next it is contended that even the mother of PW1 was also present in the scene of occurrence she was not examined as a witness. Similarly, the other witnesses who are said to have witnessed the occurrence, have also not been examined as witnesses. Here again, it has to be stated that the prosecution, in order to prove its case examined PW1, an injured witness as also PW2, an independent witness. When the credibility of the prosecution witness is strong, cogent and in such circumstances, the prosecution cannot be expected to examine all those who were present at the time of occurrence. The credibility of the prosecution witnesses has to be inferred from the quality and purity of their deposition and not the quantum of the witnesses examined by the prosecution.

15. The learned counsel for the appellants/A1 and A2 submitted that the accused persons are only mechanic and the occurrence was not premeditated one and they went to the house of P.W.1 only to bring back the bike, and there was no bad antecedent against the accused persons and the family is in penury.

16. Even according to the prosecution, A1 and A2 went to the house of P.W.1 only to bring back the bike which was forcibly taken by P.W.1 and when PW1 came out of the house, a quarrel ensued among them for some time. There is every possibility that the deceased would have provoked the accused to commit the offence. It is highly improbable that on account of this provocation, occurrence would have happened. Therefore, we are able to presume that under Section 114 of the Indian Evidence Act, there would have been provocation at the end of the quarrel emanating from the deceased and P.W.1 and in our considered view, this provocation is grave enough to indulge in the offence by losing their mental balance. Even as per the case of the prosecution, the accused were not armed with any weapon at the time of occurrence. However, it was suggested that they have taken a wooden log which was in the two wheeler stationed in front of the house of PW1. In any event, there was absence of a mens rea on the part of the appellants to commit the offence. Thus, in our considered view, the act of the accused

persons would squarely fall within the first exception to Section 300 IPC, and thus, the accused persons are liable to be punished only under Section 304 (ii) IPC. Having regard to all the mitigating and aggravating circumstances, we are of the considered view that sentencing the accused to undergo seven years rigorous imprisonment and to pay a fine of Rs.5,000/- (as imposed by the trial Court), in default, to undergo one year rigorous imprisonment, would meet the ends of justice.

17. In the result, the Criminal Appeals are partly allowed. The conviction and sentence imposed on the appellants/A1 and A2 by the trial Court, are modified as follows:

(i) The conviction imposed on the appellant/A1 under Section 307 IPC read with 34 IPC and under Section 307 IPC against A2 are confirmed and the sentence imposed therein are reduced from ten years to seven years rigorous imprisonment.

(ii) The conviction imposed on A1 for the offence under Section 302 IPC and against A2 under Section 302 read with 34 IPC, are modified to the one under Section 304 (ii) IPC and each of them are sentenced to undergo rigorous imprisonment for seven years.

(iii) The fine amounts imposed on both the accused persons by the trial Court shall stand confirmed.

(iv) The conviction of A2 for the offence under Section 294 (b) IPC is confirmed and he shall pay the fine as imposed thereunder.

(v) The sentences imposed on the appellant/A1 and A2 shall run concurrently.

(vi) The sentences already undergone by the appellants/A1 and A2 shall be set-off under Section 428 Cr.P.C.

(vii) Since A1 is on bail pending appeal, the trial Court is directed to take steps to secure his custody to undergo the remaining period of sentence, if any.

(viii) Since A2 is in jail pending appeal, he shall undergo the remaining period of sentence, if any.

-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

CS
To

1. The Second Additional District and Sessions Judge, Tiruppur.
 2. The Judicial Magistrate No.I
Tiruppur
 3. The Chief Judicial Magistrate
Tiruppur
 4. The Superintendent
Central Prison Coimbatore
 5. The District Collector Tiruppur
 6. The Director General of Police
Mylapore Chennai-4
 7. The Inspector of Police,
Anupar Palayam Police Station,
(Crime No.1817 of 2008), Tiruppur District
 8. The Public Prosecutor, High Court, Madras.
- +1 cc to Mrs.Sumathy Advocate sr6295
+1 cc to M/s.M.Devaraj Advocate sr7785

Crl.A.Nos.265 and 783 of 2018

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